BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEE ANN KIVITTER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,013,151
	)	
ST. FRANCIS HEALTH CENTER	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appealed the December 12, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

Judge Benedict ordered respondent to provide claimant medical treatment with Dr. Rhoades. Respondent contends claimant's injury did not arise out of her employment because it was a pre-existing condition and constituted a personal risk.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a food service worker for the respondent hospital. Claimant injured her low back at work on September 18, 2003, when she ". . .leaned over sideways to the left to get hamburger buns out of the drawer and I had a, a feeling go up one side of my hip and then up the other side of my hip and back and it hit the middle, and when I went to stand back up, I could not stand all the way back up and it was very, very painful just getting the hamburger buns."[1] Claimant said that she was hurting so bad that she told her supervisor that she could not finish her shift. Thereafter, claimant was sent to the hospital emergency room for treatment. She was taken off work for a few days and then placed on light duty.

[1] P.H. Trans. at 8.

Claimant has a long history of back problems and chiropractic treatment. In fact, claimant had seen a chiropractor for her back less than a month before this incident at work. Respondent does not dispute that the incident occurred in the course of claimant's employment. However, respondent disputes that the incident constitutes an accident that arose out of the employment. Because of claimant's long-standing history of back problems, respondent contends that the back injury was the result of a personal risk and, therefore, is not compensable. [2]

Claimant was working for respondent without restrictions on her date of accident. During the week before her injury she was not experiencing anywhere near the degree of pain that resulted from the work-related accident. Claimant testified that she experienced a sudden onset of pain at work on September 18, 2003, after twisting and bending down to lift the hamburger buns, that was unlike the usual aches and pains she would experience from her normal activities.

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that right depends.[3] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[4]

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. [6]

It is well settled in this State that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

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[2] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); *Martin v. U.S.D. 233,* 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[3] K.S.A. 44-510(a); *See also Chandler v. Central Oil Corp*., 253 Kan. 50, 853 P.2d 649 (1993); *Box v. Cessna Aircraft Co*., 236 Kan. 237, 689 P.2d 871 (1984).

[4] K.S.A. 44-508(g); *See also In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[6] *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

affliction.[7] "The test is not whether the job-related activity or injury caused the condition but whether the job related activity or injury aggravated or accelerated the condition."[8]

Based upon the record compiled to date the Board finds claimant's present condition is compensable as an aggravation of her preexisting condition. Therefore, the ALJ's decision to award preliminary benefits against respondent should be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[9]

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Bryce D. Benedict on December 12, 2003, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2003.

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BOARD MEMBER

c: John H. Bryan, Attorney for Claimant
J. Phillip Gragson, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[7] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.,* 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[9] K.S.A. 44-534a(a)(2).